Watermech Engineering Sdn Bhd & Anor v Novaviro Technology Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IPCV)(W)-977–04 OF 2013 AND W-02(IM)(IPCV)-1251–05 OF 2013

MOHAMAD ARIFF, MAH WENG KWAI AND ABANG ISKANDAR JJCA

15 SEPTEMBER 2014

Tort — Breach of confidence — Disclosure of confidential information — Appellants joint ventured with respondent to produce and sell system to extract and store methane gas — Technology used by joint venture company based on prototype (CSTR System) invented by third party — Inventor gave respondent exclusive licence to use CSTR System — Appellants acquired confidential information on technology used in CSTR System during joint venture — Appellants later went into business of supplying facility to extract and store methane gas using main features of CSTR System but called by different name — Whether appellants breached fiduciary duty owed to respondent by using confidential information concerning CSTR System — Whether appellants infringed respondent's proprietary right in CSTR System as exclusive licensee

The respondent sued the appellants in the High Court for breach of confidential information or breach of fiduciary duty and for infringing the respondent's proprietary and legal rights to a system ('the CSTR System') designed to capture and store methane gas when oil palm was processed. The captured methane gas could then be used to fuel refinery boilers. The suit followed the respondent's discovery, following the end of its joint venture with the appellants, that the latter had offered to install for a palm oil mill a methane gas extraction and storage system which was similar to the CSTR System though called by a different name. The respondent claimed the CSTR System was developed by Keck Seng (M) Bhd ('Keck Seng') and in consideration for payment of licensing fees, Keck Seng had allowed the respondent to have the sole right to use the system and have access to its technology. The respondent wanted to commercially exploit the CSTR System Keck Seng had devised for its own use. The respondent sourced for an engineering and construction works contractor to develop the system further for commercial use. That brought the respondent into contact with the appellants who had never been in the business of supplying bio-gas power plants. The first appellant entered into a joint venture with the respondent using a dormant company ('Aquarius') to improve upon the CSTR System and market it for sale. In all its contracts with oil palm mills for installation of a methane gas generation and storage plant, Aquarius acknowledged, in each case, that the system used was based on the

CSTR System. During the joint venture, the appellants had access to drawings, photographs and in-depth knowledge of the workings of the CSTR System. In defence to the suit, the appellants contended, inter alia, that the CSTR System was neither patented nor capable of being patented and no proprietary right in it could be acquired as the system merely used general engineering technology available in the public domain. The engineer ('PW1') who had developed the CSTR System testified that the uniqueness of the system lay in the way it used a 'dual-mixing system' with a 'floating roof' feature to maximise extraction and regulation of the methane gas in an efficient, cost-effective, reliable and safe way. The High Court allowed the respondent's claim holding that although the appellants claimed to have devised and marketed a system called 'USB', the engineering drawings of that system showed it had adopted and incorporated the unique features of the CSTR System. The instant appeal was against the High Court's decision.

Held, dismissing the appeal with costs of RM75,000:

(1) The trial court did not err in finding on balance of probabilities that the appellants had infringed Keck Seng's proprietary right in the CSTR System. The respondent as the lawful licensee of that right was entitled to enforce it against the appellants. The appellants had also committed breaches of fiduciary duty on confidentiality when they used confidential information about the CSTR System which they had acquired during the course of the first appellant's joint venture with the respondent (see paras 31, 38 & 47).

(2) The trial court was right in concluding the appellants had ample opportunity — from detailed photographs of the CSTR System provided to them and from detailed briefings on how the system worked — to come up with a process of generating methane gas based on the CSTR System. The appellants failed to adduce any evidence to show a system similar to the CSTR System employing both the 'dual mixing' and 'floating roof' features to capture and store methane gas had been in use in the palm oil processing industry prior to 1984 (see paras 33–34 & 36).

(3) During the subsistence of the joint venture between the parties through Aquarius, there was the creation of a fiduciary relationship between the respondent and the appellants who were the alter ego of Aquarius. That fiduciary relationship imposed the duty not to abuse confidential information that was available to the appellants in relation to the Keck Seng technology also known as the CSTR System. The evidence showed the technology used by Aquarius in all its projects for third parties was the CSTR System and the appellants knew that part of the monies received from the projects was to be paid to the respondent as payment towards licensing fees to Keck Seng for use of the CSTR System that was developed by PW1 for Keck Seng (see para 41).

[Bahasa Malaysia summary

Responden telah menyaman perayu-perayu di Mahkamah Tinggi kerana pelanggaran maklumat rahsia atau pelanggaran kewajipan fidusiari dan kerana melanggar hak-hak milik dan undang-undang responden kepada satu sistem ('Sistem CSTR') yang direka untuk memperoleh dan menyimpan gas metana apabila minyak kelapa sawit diproses. Gas metana yang diperoleh kemudian boleh digunakan untuk menjana dandang kilang penapis. Saman itu mengikuti penemuan responden, berikutan kesimpulan usahamanya dengan perayu-perayu, yang mana perayu-perayu telah menawarkan untuk memasangkan bagi kilang penapis minyak kelapa sawit suatu sistem pengeluaran dan penyimpanan yang sama dengan Sistem CSTR meskipun dipanggil dengan nama yang berbeza. Responden mendakwa Sistem CSTR itu telah dibangunkan oleh Keck Seng (M) Bhd ('Keck Seng') dan sebagai balasan untuk bayaran fi pelesenan, Keck Seng telah membenarkan responden mempunyai hak mutlak sistem itu dan mempunyai akses kepada teknologinya. Responden ingin mengeksploitasi secara komersial Sistem CSTR yang telah direka oleh Keck Seng untuk kegunaannya sendiri. Responden telah memperoleh kontraktor kejuruteraan dan kerja pembinaan untuk membangunkan sistem itu selanjutnya bagi kegunaan komersial. Ia menyebabkan responden berhubungan dengan perayu-perayu yang tidak pernah berniaga dalam pembekalan loji jana kuasa bio-gas. Perayu pertama telah memasuki usaha sama dengan responden menggunakan syarikat tidak aktif ('Aquarius') untuk memperbaiki Sistem CSTR dan memasarkannya untuk jualan. Dalam kesemua kontraknya dengan kilang-kilang minyak kelapa sawit untuk pemasangan loji penghasilan dan penyimpanan gas metana, Aquarius mengakui, dalam setiap kes, bahawa sistem yang digunakan adalah berdasarkan Sistem CSTR. Sepanjang usaha sama itu, perayu-perayu mempunyai akses kepada lukisan, gambar foto dan pengetahuan mendalam tentang fungsi Sistem CSTR itu. Dalam pembelaan kepada guaman itu, perayu-perayu berhujah, antara lain, bahawa Sistem CSTR itu tidak dipatenkan atau boleh dipatenkan dan tidak mempunyai hakmilik yang boleh diperolehinya kerana sistem itu hanya menggunakan teknologi kejuruteraan am yang sedia ada dalam domain awam. Jurutera ('PW1') yang telah membangunkan Sistem CSTR itu telah memberi keterangan bahawa keunikan sistem itu terletak dalam cara ia menggunakan 'dual-mixing system' dengan ciri 'floating roof' untuk memaksimumkan pengeluaran dan pengawalan gas metana dalam cara yang berkesan, kos efektif, boleh dipercayai dan selamat. Mahkamah Tinggi membenarkan tuntutan responden dengan memutuskan bahawa meskipun perayu-perayu mendakwa mereka telah memasarkan sistem dipanggil 'USB', lukisan kejuruteraan sistem tersebut menunjukkan ia telah mengambil dan memasukkan ciri-ciri unik Sistem CSTR itu. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, menolak rayuan dengan kos sebanyak RM75,000:

(1) Mahkamah perbicaraan tidak terkhilaf dalam penemuan atas imbangan kebarangkalian bahawa perayu-perayu telah melanggar hakmilik Keck Seng dalam Sistem CSTR itu. Responden sebagai pemegang lesen sah hak tersebut berhak untuk menguatkuasakannya terhadap perayu-perayu. Perayu-perayu juga telah melakukan pelanggaran kewajipan fidusiari tentang kerahsiaan apabila mereka menggunakan maklumat rahsia tentang Sistem CSTR itu yang telah diperolehi mereka sepanjang usaha sama perayu pertama dengan responden (lihat perenggan 31, 38 & 47).

(2) Mahkamah perbicaraan adalah berhak dalam memutuskan perayu-perayu mempunyai peluang yang mencukupi — daripada gambar foto terperinci Sistem CSTR yang diberikan kepada mereka dan daripada taklimat terperinci tentang bagaimana sistem itu berfungsi — untuk menghasilkan proses menjana gas metana berdasarkan Sistem CSTR. Perayu-perayu telah gagal untuk mengemukakan apa-apa keterangan bagi menunjukkan sistem yang sama dengan Sistem CSTR yang menggunakan kedua-dua 'dual mixing' dan ciri-ciri 'floating roof' untuk memerangkap dan menyimpan gas metana telah digunakan dalam industri pemprosesan minyak kelapa sawit sebelum tahun 1984 (lihat perenggan 33–34 & 36).

(3) Semasa wujudnya usaha sama antara pihak-pihak melalui Aquarius, terdapat pewujudan hubungan fidusiari antara responden dan perayu-perayu yang merupakan alter ego Aquarius. Hubungan fidusiari tersebut dikenakan duti bukan untuk menyalahgunakan maklumat rahsia yang sedia ada kepada perayu-perayu berkenaan teknologi Keck Sengyang juga dikenali sebagai Sistem CSTR itu. Keterangan menunjukkan teknologi yang digunakan oleh Aquarius dalam semua projeknya untuk pihak ketiga adalah Sistem CSTR dan perayu-perayu mengetahui bahawa sebahagian daripada wang yang diterima daripada projek itu hendaklah dibayar kepada responden sebagai bayaran terhadap fi pelesenan kepada Keck Seng bagi penggunaan Sistem CTR yang dibangunkan oleh PW1 untuk Keck Seng (lihat perenggan 41).]

Notes

For cases on disclosure of confidential information, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 20–24.

Gideon Tan (N Sivaraj and Shally Tan with him) (Gideon Tan Razali Zaini) in Civil Appeal No W-02(IPCV)(W)-977–04 of 2013 for the appellants.

Gideon Tan (N Sivaraj and Shally Tan with him) (Gideon Tan Razali Zaini) in Civil Appeal No W-02(IM)(IPCV)-1251–05 of 2013 for the appellants.

Razlan Hadri (Gregory Ling with him) (Ranjit Singh & Yeoh) in Civil Appeal No W-02(IPCV)(W)-977–04 of 2013 for the respondent.

Razlan Hadri (Gregory Ling with him) (Ranjit Singh & Yeoh) in Civil Appeal No

W-02(IM)(IPCV)-1251–05 of 2013 for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

[1] In the High Court, the plaintiff ('the respondent'), had sued the defendants ('the appellants') for the infringement of a CSTR Anaerobic Digester System ('CSTR System') developed by Keck Seng (Malaysia Bhd) ('Keck Seng') and breach of confidential information or breach of fiduciary duty by the defendants. We shall refer to parties as they were referred to in the court below. As for the facts of the case, we would reproduce what the learned trial judge had summarised as the facts which were not the subject of any strong objections from either side during the hearing of this appeal before us.

[2] The brief facts are thus as follows: The plaintiff's claim is that the technology used in the construction of the CSTR System by the first defendant is principally based on Keck Seng CSTR System or other confidential information acquired from the plaintiff through Aquarius System Sdn Bhd ('Aquarius') during the course of the joint venture between the plaintiff and the first defendant.

[3] The plaintiff claimed that Keck Seng had developed a unique and original system namely the CSTR System and Keck Seng had licensed exclusively to the plaintiff all of its proprietary and legal rights in the purported Keck Seng proprietary technology ('Keck Seng's technology'). The plaintiff claimed that it owns copyright and/or has exclusive right over the Keck Seng's technology and the defendants are to be restrained from using the same without the authorisation of the plaintiff.

[4] The defendants did not dispute that it is recognised in the palm oil industry that Keck Seng in the 1980's, was one of the earlier companies to recover methane gas from Palm Oil Mill Effluent ('POME'). However, it is the defendants' position that the CSTR System utilised by Keck Seng to extract methane gas from POME is neither patented nor capable of being patented nor has it any proprietary right. It merely uses commonly available technology in constructing tanks and/or holding tanks, piping and/or pumps.

[5] The defendants denied that Keck Seng's technology, ie, its technical know-how, methodology, expertise and specialised knowledge of the CSTR System had any proprietary rights.

[6] The defendants alleged that Aquarius had made payments to the plaintiff for the use of Keck Seng's name for marketing purposes only and not for any proprietary system procured and provided by the plaintiff or for the usage of the purported Keck Seng's technology.

[7] Further, it was contended by the defendants that each and every contract undertaken by Aquarius were designed and/or prepared by the first defendant with the technical input of the second defendant to which such designs were tailored to the respective requirements of the individual contracts.

[8] Thus, the defendants denied that the facts had given rise to any fiduciary obligations on the part of the defendants and that they were in breach of any fiduciary obligations. Thus, the defendants counterclaimed against the plaintiff for infringing the first defendant's copyright in the design of its drawing relating to the Nubika Project and United Plantation Bhd ('UPB') and unlawfully interfering with the first defendant's business.

THE PLAINTIFF'S CASE

[9] Dr Tong Soo Long, ('PW2') is a substantial shareholder and managing director of the plaintiff. PW2 was the one who had approached the late Mr Gian Heng Fatt, who was then the deputy general manager of Keck Seng in 2002, with the idea that the plaintiff could acquire the licence to commercialise the CSTR System from Keck Seng.

[10] The plaintiff contended that through a licence agreement dated 2 June 2003 (see pp 26–37 of the defendant's core bundle of documents), between Keck Seng and the plaintiff, the plaintiff acquired the 'exclusive rights to the commercial exploitation' of the CSTR System. In this regard, the licence agreement provides, inter alia:

(a) that Keck Seng had developed the CSTR System and therefore was the legal and beneficial owner of the CSTR System;

(b) in consideration for allowing the plaintiff to commercially exploit the CSTR System amongst the local palm oil mill companies, the plaintiff had to pay Keck Seng licensing fees as prescribed in cll 4–6 of the licence agreement; and

(c) pursuant to the license agreement, Keck Seng agreed to provide to the plaintiff, in essence, the workings of the CSTR System including all available drawings related to it.

[11] However, engineer NS Chua, the engineer who developed the CSTR System for Keck Seng ('PW1') stated in his evidence-in-chief that at that time, Keck Seng only had in their possession drawings limited to the construction of the 'floating roof' design of the anaerobic digester tanks and later the 'fixed roof' design of the anaerobic digester tanks. Detailed engineering drawings of the other parts of the CSTR System were not drawn as the CSTR System had been meant for internal use and was never intended to be marketed or sold as a product.

[12] It is the plaintiff's case that accordingly, full engineering drawings had to be prepared and drawn up as to all parts of the CSTR System using the existing completed structures at the Keck Seng Palm Oil Mill in Masai, Johor. In other words, the CSTR System located at the Keck Seng Masai Palm Oil Mill was to form the basis of future copies of the CSTR System for other palm oil companies.

[13] Hence, upon obtaining the licence, the plaintiff started to market the CSTR System to palm oil companies. Eventually in 2005, UPB expressed a serious interest in the CSTR System for their Jendarata, Teluk Intan, Perak estate.

[14] As negotiations advanced between UPB and the plaintiff, in late 2005, the plaintiff began to source for an engineering and construction works contractor to prepare the engineering drawings and build the CSTR System for the plaintiff for the UPB project. This led the plaintiff to the defendants.

THE DEFENDANTS' CASE

[15] The second defendant, Goh Eng Huat ('DW3') first met PW2 sometime around 2005 when PW2 approached him while attending a Council Meeting of the Association of Environment Consultants and Contractors of Malaysia. PW2 informed the second defendant that he had submitted a proposal to construct a continuous flow — stirred anaerobic tank to UPB.

[16] PW2 also conveyed to DW3 of his concern that it is unlikely that UPB would want to award the project to him since he has no prior working relationship with them. DW3 offered himself to check with UPB as to the status of the project since he had a very good working relationship with them.

[17] DW3 then notified PW2 that UPB has yet to decide to whom the project shall be awarded and PW2 upon knowing this invited the second defendant to collaborate with him to secure the said project.

[18] DW3 together with the plaintiff had agreed to utilise a dormant company, Aquarius to undertake projects to design, build and construct a continuous flow stirred tank reactor CSTR System for the recovery of methane gas from the treatment of POME.

[19] An agreement dated 11 May 2006 ('Aquarius Agreement') was executed between the plaintiff and Aquarius as an assignment of the contract works for the design, supply, fabrication, installation, testing, and commissioning of the CSTR System for UPB from the plaintiff to Aquarius.

[20] The defendants did not dispute that it is recognised in the palm oil industry that Keck Seng, in the 1980's, was one the earlier companies to recover methane gas from POME. However, it is the defendants' position that the CSTR System utilised by Keck Seng to extract methane gas from POME is nether patented nor capable of being patented nor has it any proprietary right. It merely uses commonly available technology in constructing tanks and/or holding tanks, piping and/or pumps.

[21] The defendants denied that Keck Seng's technology, technical know-how, methodology, expertise and specialised knowledge of the CSTR System has any proprietary rights.

[22] According to the defendants, Aquarius made payments to the plaintiff for the use of Keck Seng's name for marketing purposes and not for any proprietary system procured and provided by the plaintiff or for the usage of the purported Keck Seng's technology.

[23] Each and every contract undertaken by Aquarius was designed and/or prepared by the first defendant with the technical input of the second defendant to which such designs were tailored to the respective requirements of the individual contracts.

[24] The defendants also contended that the plaintiff never provided any proprietary drawings, technical specifications, engineering drawings and/or construction drawings that are sufficient for construction purposes and/or capable of being copied and/or utilised by Aquarius in the procurement of any contracts.

[25] The learned trial judge, having heard the evidence of witnesses called by both parties, had decided in favour of the plaintiff. In the course of deciding this case before her, the learned trial judge had identified that one of the crucial issues that needed to be determined by her was whether the CSTR System, the centre of the dispute between the parties, was a system that was developed by the plaintiff, so as to give it proprietary rights over the system.

[26] Perhaps it would now be pertinent to understand what this CSTR System was all about. To begin with, it had pertained to the oil palm industry. In particular, it had been concerned with a system whereby the methane gas that was emitted by the processing of fresh oil palm was captured from the treatment of POME whereby the captured methane would later on be used as fuel. Prior to the coming into existence of the CSTR System, the methane gas that was emitted from the oil palm processing would be released *in situ* and was burned openly. There was no retention of the gas to be used at a later date. The captured methane gas could be used to fuel the refinery boilers.

[27] According to the plaintiff, this CSTR System was developed by Keck Seng dating back to 1983. It was a home-grown technology that was meant only for use by Keck Seng which had owned oil palm plantations and that there was no intention during that time to market the system on a commercial basis.

[28] The plaintiff also reiterated that only in 2002 that Keck Seng was interested in commercilising the system when PW2 approached Keck Seng with a view to market the system.

[29] The essential and unique feature of the CSTR System that was developed by Keck Seng was described by PW1, the engineer with Keck Seng who had developed the system. The sytem would be used to produce POME waste from the extraction of crude oil palm from fresh fruit bunches. The CSTR System was developed to maximise and capture the methane gas that was the by-product of the safe discharge of the POME. In his own words, PW1 had said as follows:

> The uniqueness of the CSTR Anaerobic Digester System does not come from the anaerobic process itself. Instead, the uniqueness of the system comes from how the system was built and designed to maximize the production of methane gas and the regulation of the produced methane gas to allow for an efficient, cost effective and safe system that is reliable.

To further emphasise the unique feature of the system, PW1 had said:

> As I have said before, no one else had developed and built a similar system that could produce this amount of methane gas per tone of POME waste treated and at the same time work as efficiently as Keck Seng's CSTR Anaerobic Digester System.

[30] From the evidence, it was apparent that the two main features that typified this CSTR System that was developed by Keck Seng have been, (a) the dual mixing system for the anaerobic digester tanks, and (b) the floating roof design. Both designs were created to maximise efficiency and flexibilty of the CSTR System. The dual mixing system that was designed had employed the use of an external system of tangential injection pumps for circular mixing and effluent recirculation along with a gas-lifting process for the vertical mixing to create optimum mixing of the POME causing a more efficient production of methane gas. As regards the floating roof, it had been designed based on the use of an annular (ring shaped) liquid sealing design and incorporating unique tension guide rollers along the tank to smoothly guide the rise and fall of the floating roof changing the gas-holding capacity of the anaerobic digester tanks to regulate the methane gas produced. The benefit to be derived from this has been to enable the methane gas supply at regulated pressure.

[31] After considering the evidence before her, the learned trial judge had concluded that the protection that the plaintiff had sought from the law had

been the 'method or process developed by Keck Seng to maximise the extraction and capture of the methane gas in the CSTR System' (see p 15 of her grounds of decision). With respect, we would agree with her conclusion. Indeed the idea of extracting methane gas from POME through an anaerobic digestion process was never an idea first germinated by Keck Seng. But what Keck Seng had developed via PW1 has been the efficient, reliable, safe and cost competitiveness of the CSTR System with its unique features. In that design there is proprietary right for which Keck Seng is entitled to protection under the law. The plaintiff as the lawful licensee is also entitled to enforce it against the defendants.

[32] The defendants had contended that the CSTR System that was graphically shown in P3 was not the product of Keck Seng. It was the defendants' contention that the 'pump tangentially feeding into the digester tank, flexible holes and draft tube' were already available in the public domain as general engineering knowledge. For good measure, the defendants had also argued that DW1 had developed the CSTR System with there own skill and knowledge and was therefore the copyright owner.

[33] To this, we noted that the learned trial judge had made a finding, that the defendants had never brought before her, evidence that there were designs, prior to 1984 that were similar to the one that was developed by Keck Seng, namely the CSTR System. On available evidence as contained in the records of appeal, we find that the learned trial judge had not erred in coming to such a finding. Indeed, during the course of submissions before us, learned counsel for the defendants had contended again that based on the literature on engineering, the dual system employed in the CSTR System was already available in the public domain. But, having considered such contention, we are of the respectful view that the learned trial judge was entirely correct when she concluded at p 16 in her grounds of decision, as follows:

> ... and in my view it did not show that a similar system was ever specifically designed and/or constructed by anyone else or that such unique features of the CSTR System were already in use together in the public domain.

Indeed the contention of the defendants was against the grain in so far as the evidence was concerned.

[34] We note that the CSTR System, as the name connotes, is a 'system' and as such it must necessarily consist of at least a few components that are so essential, which when taken together contribute immensely towards its functionality as a system. In the CSTR System, the 'dual mixing system' and the 'floating roof' are uniquely and essentially designed into delivering the methane gas safely and efficiently. The learned trial judge was correct in her

finding that there was no similar system in use prior to 1984 that had employed both these features in the palm oil processing industry relating to methane gas production and storage.

[35] The learned trial judge had also found as a fact that the CSTR System was not first developed by DW1. Instead, she had alluded to the evidence of PW1 who had developed the system at Keck Seng. According to PW1's evidence, an engineer could build the CSTR System if he was provided with the photographs. He was referred to in court, the 75 photographs marked as exhs P4(a) to P4(w3) which showed detailed parts of the CSTR System and agreed that such photographs would be sufficient for an experienced engineer to build a system similar to the Keck Seng digester system. Indeed in the cross-examination of PW1 by learned counsel for the defendant, PW1 had said:

> These photographs were taken very extensively. I don't know who has taken this photograph but it actually zero in on each and individual detailed components. So you can see that so many photographs were taken on this system. Anybody who got this photograph will be able to design, reproduce (the CSTR system).

[36] In fact, it was established in evidence before the learned trial judge that SD3 was given the 75 photographs by PW2. DW3 in fact admitted to this fact during his cross-examination. On top of that, another witness of the defendant, DW1 had admitted to being briefed in detail on the CSTR System during a visit to the Masai Oil Palm facility that employed the Keck Seng system. The learned trial judge was correct when she concluded that in the circumstances there was ample opportunity for the defendant to come up with the process in generating the methane gas that was based on the CSTR System that was licensed to the plaintiff from Keck Seng.

[37] As was earlier alluded to by us, the plaintiff and the joint venture entity called Aquarius had entered into not a few agreements and in the agreement relating to the UPB project, in cl 3(iii) of that agreement, it was stipulated that the plaintiff would retain a certain amount of payment received from UPB for payment to Keck Seng as licensing fees for the use of the Keck Seng CSTR System. Aquarius was a dormant company picked by the defendant to become the joint venture vehicle with the plaintiff. In the circumstances, the learned trial judge was correct in concluding that the defendant would be estopped from denying that the CSTR System had in fact come from Keck Seng.

[38] Based on the foregoing, this court has found that the learned trial judge did not err when she concluded that on the balance of probabilities that the defendants had infringed the CSTR System that was first designed by Keck Seng. She was also correct when she found that the defendants had used the technology principally based on Keck Seng's CSTR System and other

confidential information acquired from the plaintiff through Aquarius during the course of the joint venture between the plaintiff and the first defendant, when it purportedly developed its own CSTR System. The learned trial judge's finding can be seen at para 52 at p 24 of her grounds of decision. We have found no reason to disturb her findings on the evidence as adduced before her.

[39] Then there was the issue of fiduciary duty and confidential information and breaches in relation thereto by the defendants. The basis for these had been the the joint venture agreement that was entered into by both parties, whereby Aquarius was used as a vehicle to undertake the construction of the system for third parties in relation to the generation and storage of methane gas at the latters' oil palm plantations. From a perusal of the relevant documents (relating to these contracts) it had become clear that the system that was to be employed would be the Keck Seng technology system which the plaintiff had been licenced to operate. In fact, every contract with the third parties contained specific stipulation to that effect. To illustrate as an example, we would advert to the contract with UPB. That contract related to the proposal to design, supply, fabricate, instal, test, and commission a 400 M3/d POME Biogas-Capture Anaerobic Digester System. Clause 3.0 of the contract stipulated as follows:

> PROPOSED TREATMENT PROCESS
>
> The treatment process is basically a Continuous Flow-Stirred Tank Reactor (CSTR) System based on the proprietary KS Anaerobic Digester technology and design. The digester tanks comprise both fixed roof and floating roof types. The floating roof tanks also serve as gas holder and for balancing the flow for the biogas before being consumed directly in the boilers.

[40] It was not in dispute that 'KS' therein referred to 'Keck Seng'. In fact, all the contracts with the third parties employed this anaerobic digester technology which was licensed to the plaintiff. The defendants' entry into the joint venture with the plaintiff via Aquarius did not see them bringing along with them any anaerobic digester technology. As can be seen clearly in the joint venture agreement between the plaintiff and Aquarius, the latter's entry into the joint venture was basically to commercially exploit the viability of the digester system whereby it was specifically recognised that the plaintiff was 'the holder of the Licensing Rights of Keck Seng (Malaysia) Berhad's (hereinafter called 'KS') unique and original full capacity Anaerobic Tank Digester System (hereinafter to be referred to as 'the Digester System' ...' (see the agreement between the plaintiff and Aquarius at Tab 14 of the respondent's core bundle). The defendants did not have any history of dealing in any supply or invention of anaerobic digester system, prior to its involvement in the industry with the plaintiff through Aquarius. That was an admitted fact by the defendant's witness, DW1 through cross-examination by learned counsel for the plaintiff. In fact under the above agreement cl 4 therein contained provisions that

specifically made it an obligation on the part of Aquarius in that, among others, it 'shall not in any way infringe harm or contest the rights and interest of NVT (the plaintiff) to the Digester System.'

[41] During the subsistence of the joint venture between the plaintiff and Aquarius, there was the creation of the fiduciary relationship between the plaintiff and the defendants who were the alter ego of Aquarius. DW3, the defendants' third witness had in fact signed the agreement on behalf of the defendants. That fiduciary relationship thereby had imposed the duty not to abuse that special relationship by not abusing the confidential information that was available to the defendants in relation to the Keck Seng technology also known as the CSTR System. The evidence had shown that the technology to be used by Aquarius in all the joint venture projects for third parties was the CSTR System. The evidence was also clear that the defendants knew that for a fact, part of the amount received from the joint venture projects was to be paid to the plaintiff, being payment towards licensing fees to Keck Seng for using the CSTR System that was developed by PW1 for Keck Seng. This court, with respect is of the view that the learned trial judge was correct when she held that there existed a fiduciary relationship between the defendants and the plaintiff as a result of the joint venture between the plaintiff and Aquarius. As a partner in the joint venture projects with the plaintiff, the defendants were in a fiduciary relationship with the plaintiff and with that relationship of a fiduciary nature, certain obligations were imposed on the defendants that pertained to the confidential nature of sensitive information over which the plaintiff was licensed to have for a fee that it had paid to Keck Seng. The learned trial judge's reliance on the authoritative work by John Glover in his book entitled, *Commercial Equity Fiduciary Relationship*, (Butterworths) 1995 had been justified and we see no error on her part in that regard. Indeed at p 8 of his book, the learned author had written, among others, as follows:

> Confidential information may be received pursuant to a fiduciary relationship. Trusted employees may learn their employer's trade secrets through the circumstances of their employment; a manufacturer may discover the confidential idea of an inventor, who approached the manufacturer to do a deal. Equity in these cases has established jurisdiction to relieve the employer and the inventor if their confidences are breached. Relief is often grounded in the fiduciary nature of the relation whereby the confidence was passed. Injuctive or restitutionary remedies are allowed against a person who misuses the confidential information of another, or discloses to a third party.
>
> For example, during negotiations for a co-operative business venture between a small mining company and a larger one, details of a mineral discovery were revealed. A duty for the larger company to respect the smaller company's confidence arose and was broken when the larger company decided to exploit the discovery alone. Or a former employee of an importing company might start up his own business and use the same network of suppliers that the former employer found by experience to

be reliable. Yet again, a dishonest employee of a geosurvey company might sell confidential data of a client oil company to a third party. Confidentiality is breached in each case.

[42] With that fiduciary relationship as found by the learned trial judge, there arose a fiduciary duty on the part of the defendants to protect the confidential information that was available pertaining to the Keck Seng technology that was being employed by Aquarius to construct the system for the numerous third parties during the duration of the joint venture with the plaintiff.

[43] The complaint by the plaintiff against the defendants had been that when Aquarius left the plaintiff, it had secured a contract with a company called QL-Palm Tong Lon Palm Oil Mill in Tawau, Sabah ('the QL Plant') for the construction of the system at the latter's oil palm plantation, whereby the plaintiff had suspected that the defendants had offered a system that was essentially the same as the CSTR System that was developed for Keck Seng by PW1. The defendants had denied this allegation and had contended that the system it was offering to the QL Plant was the 'USB System' that the defendants claimed to be its proprietary owners. According to the defendants, the USB digester was a system that operated entirey differently from the one used in the CSTR System. That technology, according to the defendants was sourced from a handbook entitled the 'Wastewater Treatment Plants-Planning, Design and Operation' by one Syed R Qasim, whereby it had involved a process described as an 'upflow anaerobic sludge blanket process.' From this process, it was claimed by SD1, that the defendants had obtained the name 'the USB System'. However, during cross-examination by learned counsel, DW1 agreed that the USB System's mixing system was essentially the same as the dual mixing system that was uniquely perculiar to the CSTR System owned by Keck Seng. In this regard, the learned trial judge had at para 77 at p 34 of her grounds, concluded as follows:

> As explained by PW1, the uniqueness of the CSTR System (apart from the dual mixing system and the floating roof) is how all these features were arranged together to work efficiently, cost effective and safely. This seems to me forms the confidential information.

[44] The evidence abound in terms of the opportunity that the defendants had to access to the CSTR System when it entered into a joint venture with the plaintiff to supply the CSTR System to the various third parties. The defendants were given detailed insight into the designs of the system where a total of not less than 75 photographs were given to the defendants from which an experienced engineer could reproduce the system similar to the CSTR System. The defendants were given briefings on the CSTR System as well as given a site visit to the CSTR plant owned by the plaintiff. It was revealed out

in evidence too that the defendants had never been in the business of supplying bio-gas power plants before they partook in the joint venture projects with the plaintiff through the special purpose vehicle ('SPV') called Aquarius to supply the CSTR System to the various third parties. Indeed, in those agreements to so supply, there were confidentiality provisions, thereby negating any semblance of ignorance that the defendants may put up in relation to the confidentiality issue. As an illustration, cl 11 of the works contract between Aquarius and Nubika had provided:

> 11. CONFIDENTIALITY OF THE CONTRACTOR'S ANAEROBIC DIGESTER TECHNOLOGY
>
> The Client shall abide by the Confidentiality and No-disclosure requirements of the Contractor's Anaerobic Digester Technology know-how and design as follows: (i) The Client or any other persons under his employment shall not disclose any technological and technical information on the know-how and design of the Contractor's Anaerobic Digester Technology to any other persons or organisations outside the Client's company, (ii) The Client shall not use the know-how and design for its own purposes by installing additional anaerobic digester plants on its own for its other palm oil mills, or in any competitive manner against the Contractor, (iii) The Confidentiality and No-disclosure requirements shall be binding to the Client, and any persons under his authorisation and assignment to the project. (See p 77, the respondent's core bundle of documents).

[45] The defendants had contended that even if there was a fiduciary relationship between the two parties, the defendants had not breached the fudiciary duty. But the evidence adduced had persuaded the learned trial judge to differ from that stance taken by the defendants. To her, the defendants had breached that duty. For that stance, she had given her reasons.

[46] Among others, the reasons were clearly spelt out in her grounds of judgement. To our mind, two pieces of evidence as found by the learned trial judge had nailed it on the head. Those evidence had been concerned with the drawings that purportedly related to the USB System. In this regard, we cannot do better than to reproduce the learned judge's findings, which can be found in her grounds of decision, at pp 45–47 in her grounds of decision:

> 106. The plaintiff however contended that DW1 subsequently made changes to certain features of the system that the first defendant was building for QLP (see exh P3 the slide presentation by NS Chua). In respect of the changes made by DW3 (reference is made to exh P3), PW1 performed a visual comparison of the engineering drawings of the CSTR System by Keck Seng and the engineering drawings of the 'USB System' allegedly developed by the first defendant for QLP (see exh P3) pp 22–25). In this regard, PW1 testified that:
>
> (i) As shown at p 24 of exh P3, the defendants changed from a 'floating roof' tank design to a 'membrane roof' tank design. However, in doing so, the defendants forgot, omitted or mistakenly failed to incorporate the changes across all of its engineering drawings.

(ii) For example, as shown at that same page, the engineering drawing at p 952 of B22 still maintained a triangle (denoting a 'floating roof' design) on top of the tank instead of a semi-circle (denoting the new 'membrane roof' design).

(iii) At p 25 of exh P3, PW1 further explained that if a 'membrane roof' was now employed, there would be no need for external supporting columns coming from the roof to the ground resting outside of the tank itself. Nevertheless, the engineering drawings at p 952 of B22 still showed these external columns.

107. With regard the mixing system of the POME in the digester tanks (which is one of the unique features of the CSTR System), DW1 admitted under cross-examination that essentially the mixing process in the QLP project consisted of 'circular motion and tangential at the same time'. Thus, the irrestible conclusion that can be drawn is that this was the 'dual mixing system' that PW1, the creator of the CSTR System, had described as one of the key unique features.

[47] As such, with respect, we see no reasons nor occasion, to differ from her conclusions. We agree with her that the defendants had committed breaches of the fiduciary duty on confidentiality.

[48] As regards the anton pillar order, we are in agreement that the learned trial judge was correct, under the circumstances, to grant the order as applied for by the plaintiff and to not have it set aside. The risk factor that the defendants may destroy or cause to be destroyed the incriminating evidence was not one that was merely playing in the mind of the plaintiff. The various documents that were obtained as a result of the enforcement of that order had brought significant advantages that had helped decipher the problems pertaining to the issues at hand between the parties. Of immense importance, in our view must be the drawings recovered from the defendants from which the ensuing cross-examination of the relevant defendants' witnesses had led to the revelation as regards the true source of the so-called USB System which the defendants had claimed to be entirely different from the CSTR System which had its genesis in the works of SP1 for his employer Keck Seng and for whose use the plaintiff had been paying licensing fees to Keck Seng.

[49] As can been seen above, the learned trial judge had made various findings of facts impacting on the crucial issues. We find that her findings had been supported by the evidence as led before her and her findings had not been without basis. She had the audio visual advantage of observing the various witnesses who had appeared and testified before her and she had preferred the evidence given by the witnesses for the plaintiff. Her findings had been made not without cogent reasons. In such circumstance, we have to defer to her decision. We are of the considered view that the learned trial judge cannot be said to be plainly wrong in coming to her decision, such that we would be

justified in invoking our appellate powers so as to right an obvious miscarriage of justice. In our view, there has been none here that needed our curial intervention.

[50] We therefore see no merits in the memorandum of appeal as filed by the defendants in this appeal and as such we hereby dismiss the appeal with costs of RM75,000 to the plaintiff/respondent. We also order that the deposit be refunded to the defendants/appellants.

[51] Order accordingly.

Appeal dismissed with costs of RM75,000.

Reported by Ashok Kumar